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FEB 19 1906
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No. [redacted]192

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN J. ALLEN, APPELLANT,
v.
THE UNITED STATES, APPELLEE.

BRIEF OF UNITED STATES IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN J. ALLEN, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 569.

BRIEF OF UNITED STATES IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

(1) Appellant asks that a certiorari be issued to the Court of Claims, directing it to send up certain evidence which was before it in the trial of this cause. It is alleged, in effect, that said evidence will convince this court that the Court of Claims was in error in finding that—

> The court declined to make the usual order of approval, but made an order which, after reciting the proper presentation, said:
>
> And it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the Government in the matter of the approval of said account, and there being therefore no question in regard to

> said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the United States Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant,
>
> It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid. (40 C. Cls. R., 172.)

The mere statement of this proposition is a sufficient warrant for the refusal of the writ. Rule 14 can not be invoked for any such purpose. As this court said in the case of Adams (6 Wall., 101):

> To do so would require an examination of evidence, and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of the jury, and which, by our rule, we intended to exclude from the consideration of this court, by making such finding by the Court of Claims conclusive.

Appellant failed to pursue his remedy in the Court of Claims by moving to have the findings amended. He perfected his appeal, and it seems clear that he is now too late in making this objection. If the Court of Claims had failed to find upon the subject-matter involved herein it might then be competent to require the evidence constituting the exhibits indicated to be certified to this court in order to complete the record, but, inasmuch as the Court of Claims made a clear, positive, and unequivocal finding, showing the form and

character of the order of approval granted by the trial court which approved the accounts in question, it is not possible to now attack the veracity of that finding in this court, and the motion should be dismissed.

To the proper issuance of a certiorari it should appear on the face of a record that there is a material deficiency. (*Elmore* v. *Grymes*, 1 Peters, 469.) The claim here is not that the court omitted to make a finding on a material point, but that the finding made is erroneous.

(2) Appellant asks that a certiorari be issued to the Court of Claims, directing it to send up certain records and reports which were before it in the trial of this cause, and which, it is alleged, will convince this court that the Court of Claims was in error in finding that—

> The accounts presented by the claimant for said services amounted to the sum of $3,120, which said sum was allowed and paid the claimant by the accounting officers *by mistake*, and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character. (40 C. Cls. R., 176.)

It is urged that the records and reports aforesaid will show that the payment by the accounting officers was not made "by mistake;" that they perfectly understood all the facts pertaining to the circumstances under which the services were rendered and the accounts presented.

This request is subject to the objections before stated. The allowance of the request would require

the court to go behind the findings of the Court of Claims on the subject and examine the testimony, a thing which this court has declared it will not do. (Adams case, *supra.*)

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.